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Supreme Court, U.S.
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No. 00-1304

IN THE

Supreme Court of the United States

THE KROGER CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that § 515 of ERISA precluded consideration of parol evidence offered by an employer to show an oral union-employer understanding that contradicted the unambiguous written labor contract setting forth the employer's written pension contribution commitment because the oral understanding was not disclosed to the pension fund.

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STATEMENT OF THE CASE

A. Relevant Contract Language.

Since 1967, the warehouse facility maintained by the Kroger Company ("Kroger") in Atlanta, Georgia (the "Atlanta Center") has been covered by a series of collective bargaining agreements between Kroger and Local 528 of the International Brotherhood of Teamsters ("Local 528"). These agreements consisted of a nationally negotiated master agreement that applied to the Atlanta Center as well as several other Kroger locations nationwide, and a local supplement negotiated by Kroger and Local 528 that applied solely at the Atlanta Center (the "CBAs"). Pet. App. 2a-3a. Kroger's participation in the Central States, Southeast and Southwest Areas Pension Fund ("Central States") began in 1971. Pet. App. 3a.

The master portion of the CBAs divided the covered workforce into three groups: casual employees, probationary employees and regular employees. Pet. App. 43a. A new hire could be either a casual or a probationary employee. See, Respondents' Appendix in the Court of Appeals ("CS Appl. App.") at 240-3, 266. The CBAs defined a probationary employee as "[a] new employee . . . work[ing] under the provisions of the Agreement . . . employed only on a trial period of thirty working days, not to exceed sixty (60) calendar days during which period he may be discharged at the discretion of the Employer." CS Appl. App. 189. "After the trial period ends . . . probationary employees become regular employees and 'shall be placed on the regular seniority list.' " Pet. App. 43a-44a Casual employees were defined as "[t]hose employees hired on a short-term basis [who] may be employed from time to time." CS Appl. App.189. "Most importantly, the CBA provides that casuals do not receive fringe benefits or accrue seniority." Pet. App. 44a.

The pension clause in the CBAs required Kroger to contribute to Central States a specified weekly amount "on behalf of all employees who had worked for thirty days or more and who had been placed on the seniority list." *Id.* "The effect of [the pension clause] is that Kroger is required to make contributions to [Central States] on behalf of all probationary employees who had completed their trial period, but not on behalf of casual employees." *Id.* The pension clause also stated that contributions were due on "each regular . . . employee, even though such employee may work only part-time under the provisions of this contract." CS Appl. App. 194. Thus, Kroger was required to contribute to Central States on both regular full-time and regular part-time employees. Pet. App. 4a, 16a.

The parties stipulated that prior to 1977, all newly hired warehouse employees were designated as probationary employees, so contributions were paid on behalf of every new hire after 30 days of employment. Pet. App. 5a, 44a; CS Appl App. 205; Trial Tr. 714-25. However, "[i]n 1977, Kroger changed that designation and classified all newly hired warehouse employees as casuals." Pet. App. 44a. As a result of the 1977 change, contributions were not paid on new hires until they qualified on a bid for one of the 13 distinct warehouse job classifications which typically took 6 to 9 months, not after 30 days of employment as had occurred prior to the change. Pet. App. 15a. This dramatic change occurred in the midst of the 1976-1979 collective bargaining agreement, yet there were no written amendments or modifications made to the CBA in 1977 or thereafter that reflected this change until shortly after Central States asserted its claim for additional contributions in 1991.[1] No one at Kroger knows anything about the circumstances surrounding

[1] The CBA signed in 1992 indicated that all new hires were part-timers and contributions were not owed on their behalf until they had worked 9 months. CS Appl. App. 209

the 1977 change. CS Appl. App. 122-124, 179-181, 184-186. The assertion in Kroger's petition that this dramatic change was made "with full disclosure to the respondent" is utterly false and unsupported by any finding by the district court or appellate court. In fact, Central States did not learn about the practice until the 1990 audit that precipitated this lawsuit.

B. The Decisions Below.

Early in the case, the parties filed cross-motions for summary judgment where each party argued that the CBAs were unambiguous and required judgment in their favor. Pet. App. 50a. The district court denied Central States' motion and granted Kroger's motion. However, the court of appeals reversed, holding that the district court had erroneously decided that it was unnecessary to try to reconcile the language of the local and master portions of the CBAs. Pet. App. 48a-50a. The court of appeals indicated that when the two agreements were read together as a unified contract, the term "part-time employee" was ambiguous because it could be synonymous with the term "casual employee" in which case no contributions were due, or it could mean a regular part-time employee in which case contributions were due. Pet. App. 50a. Because of the perceived ambiguity, the court remanded the case for a determination of the meaning of the term "part-time."

After a two week bench trial during which the district court received the testimony of over twenty witnesses and over three hundred exhibits, the district court ruled in Central States' favor. The district court recognized that the key to the case was whether the new hires were actually casual employees as Kroger claimed. Pet. App. 24a. If they were, the CBAs indicated they were not entitled to any fringe benefits, including the pension contributions sought by Central States. On the other hand, if they were not casual employees, they had to be probationary employees and should have been placed on the seniority list after 30 days at

which point Kroger was obligated to remit contributions on their behalf.

To resolve this issue, the district court focused on the actual relationship between Kroger and the new hires to determine if it was consistent with CBA language defining casual employees as "[t]hose employees hired on a short term basis [who] may be employed from time to time." CS Appl. App. 99-101. The district court concluded that the new hires were not covered by this definition because the evidence demonstrated that "the employees in question were hired by Kroger with the hope and expectation that they would become, each of them, full-time regular employees" and they were "continuously on hand to work part-time" so they were neither "short term" or hired from "time-to-time". Resp. App. 12a. The district court indicated that this finding was based upon evidence about the new hires "training and nurture," which included testimony of Kroger's management employees indicating the part-time employees were going through a "training period" and that it was inevitable they would become full-timers if they stayed with Kroger. Resp. App. 12a; CS Appl. App. 126-8. A manage-ment employee also testified that the high turnover of new hires was disappointing to Kroger because it was forced to continually invest significant time in training new hires, further demonstrating that Kroger sought a long-term relationship. Trial Transcript 539. The district court also relied upon "the employee handbooks" which referred to the new hires as "probationary part-timers," welcomed the employees to the "Kroger team," encouraged them to use the handbooks "during your first several weeks at Kroger," and described the lengthy training and support they would receive from Kroger. Resp. App. 12a; CS Appl. App. 140-161.

Nevertheless, the trial court determined that the "local union representatives and the [company] negotiators acquiesced in Kroger's treatment of all new hires as part-timers" (not as "casuals" as Kroger repeatedly represents in

its petition) and in Kroger's practice of not paying contributions on their behalf while they were labeled as part-timers. Pet. App. 6a-7a. Further, it determined that the new hires were told about Kroger's practices when they were hired. *Id.* While the district court explicitly found that Local 528 negotiators and the new hires were aware of Kroger's practices, it did not determine that Central States was aware of or acquiesced in the practices as Kroger repeatedly and erroneously represents in its petition. Pet. App. 22a-26a. The trial court determined that these "local understandings cannot prevail against the definition of 'probationary' employees contained in Article 2.2 of the Master Agreement. Because the employees were not casual, they were necessarily probationary and therefore, entitled to fringe benefits. They were, in the formulation of the court of appeals, regular employees who worked for a shorter week. (In fact, they often worked a full week, but in no event were they 'casual' employees under the definition in the master agreement)." Pet. App. 26a.

The court of appeals affirmed. The court of appeals noted that the parties devoted most of their arguments to the question of the meaning of the ambiguous term "part-time" but it indicated that "[w]e shall begin our analysis, however, by examining one of the unambiguous terms of the CBA—the term 'casual employee'." Pet. App. 12a. The court of appeals indicated that it agreed with the district court's determination that the contract definition of casual employee indicated that the term "refer[ed] to those employees that Kroger intended, when it hired them, to work for a short period of time . . . [who] would not be employees Kroger expected 'in the normal course' to work 'for long periods of time' . . . [but] would be people 'who come and go, people whose employment was interrupted, people who might be absent for long periods of time' rather than people 'who are on hand continuously to work part-time as needed.' " Pet. App. 12a-13a. The court of appeals noted that the

evidence concerning whether the new hires fell under the contract definition of casual employees was disputed, however, the court of appeals recognized that the district court's finding was to be reviewed for clear error and it concluded that there was sufficient evidence to support the district court's determination that the employees were not casual employees. Pet. App. 14a.

The court of appeals then held that under § 515 of ERISA, "Kroger's practice of treating the employees as "casuals" [so that they were ineligible] for pension contribution purposes when, in fact, those employees were not hired on a short-term basis or employed from time-to-time cannot thwart the unambiguous definition of casual employees contained in the CBA." Pet. App. 16a.

SUMMARY OF THE ARGUMENT

In an effort to create a conflict between the Seventh Circuit and the Third Circuit, Kroger claims that the court of appeals made a holding that it did not make, and it asserts new arguments that it did not make in the court below. Contrary to Kroger's assertion, the court of appeals did not address the issue of whether § 515 barred "extrinsic evidence to establish that a CBA term is ambiguous . . . [so] that petitioner was bound by what the court took to be the CBA's definition of 'casual employees'." Instead, the court indicated that the meaning of the term "casual employees" could be determined solely from the contract language because the parties had *agreed* that the term was unambiguous.

Nor did the court of appeals hold—as Kroger claims in its petition—that the rule barring evidence of a union-employer agreement at odds with an employer's unambiguous written agreement it had adopted in earlier cases under § 515 of ERISA, applied even when the fund received contemporaneous notice of the union-employer agreement. This issue was not addressed because Kroger did not argue that Central

States had contemporaneous notice of the Kroger-Local 528 understanding.

Even if the court of appeals made the holdings claimed by Kroger, the writ should be denied because Kroger could not prevail on the merits if the Third Circuit's approach was adopted. Kroger completely ignores the Third Circuit's requirement that its proffered contract interpretation must ultimately be anchored in the language of the contract. Kroger's claim that unambiguous CBA language defining casual employees as those employees "hired on a short-term basis [who] work from time-to-time" can be trumped by parol evidence allegedly indicating that the parties really intended the term to mean employees hired to be permanent additions to the workforce, would not be permitted in the Third Circuit because the interpretation is completely at odds with the contract language.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

A. The Decision Cited By Kroger Authorizing Consideration Of Extrinsic Evidence Is Distinguishable Because Neither Party Argued That The Term "Casual Employee" Was Ambiguous.

Kroger represents that the court of appeals held that Kroger "was bound by what the court took to be the CBA's definition of 'casual employees' in the master agreement because that term was not obviously ambiguous" and as a result, the court of appeals refused to consider Kroger's extrinsic evidence designed to show that the term was really ambiguous. Petition at 8. According to Kroger, this determination should be reviewed because it conflicts with the decision in *Teamsters Industry Employees Welfare Fund v. Rolls-Royce*

Motor Cars, Inc., 989 F.2d 132 (3rd Cir. 1993), where the Third Circuit held that parol evidence could be considered to determine whether a facially clear contract term was really ambiguous.

However, the court of appeals' determination that the term "casual employee" was unambiguous was not, as Kroger argues, based upon the court of appeals' judicial determination that the term was facially clear. To the contrary, the reason the court of appeals decided that the term was clear was because the parties did not argue that the term was unclear. The court of appeals stated:

> Section 2.3 of the Master Agreement states that casual employees, who are hired on a "short term basis," may be "employed from time to time" at Kroger facilities with a history of hiring such employees. CBA § 2.3. *The parties do not claim that the meaning of "casual," as it is used here, is ambiguous; nor have they questioned the meanings of "short-term basis" or "from time to time."*

Pet. App. 12a (emphasis added). This determination is obviously correct. In the courts below, Kroger tried to show that the new hires were hired on a short term basis to work from time to time so they were encompassed by what it conceded to be the clear contract definition of the term casual employee. That effort has failed so Kroger argues a completely new theory in its petition—it maintains for the very first time that the term casual employee is unclear and was really intended to encompass long term, permanent employees. However, Kroger should not be permitted to obtain review based upon an argument that was not made in the court below.

To be sure, the court of appeals' initial decision indicated that the contract was ambiguous. However, the perceived ambiguity had nothing to do with the term casual employee

but was premised upon "the term part-time—a term central to the issue in this case—[which] is susceptible to more than one reasonable meaning thus rendering the CBA ambiguous." Pet. App. 50a. In the court's view, the term "part-time could mean casual" as Kroger contended and if so, a part-time employee would be a short term employee who worked from time to time who was ineligible for pension benefits. *Id.* On the other hand, the term part-time employee could "refer to a regular employee who works a shorter week" as Central States contended and if so, the contributions were due because the contract required contributions on all regular employees, even if they only work part-time. *Id.* But the court of appeals' earlier decision did not express any doubt about the meaning of the term "casual employee." As a result, the parties' parol evidence at trial was directed at proving that the terms were or were not synonymous and that the employees actually were or were not casual employees, but neither party ever argued that term casual employee was unclear. Pet. App. 12a, 23a.

Certainly there is nothing controversial about the refusal to consider parol evidence to determine the meaning of a term that the parties agreed was clear, and the *Rolls-Royce* decision does not suggest that a court should consider such evidence on its own initiative. At a minimum, the Third Circuit would require a party to at least claim that a facially clear term was actually ambiguous before considering parol evidence. Since neither party suggested that the term "casual employee" was unclear, the *Rolls-Royce* decision is distinguishable and does not conflict with the court of appeals' decision.[2]

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[2] Kroger erroneously represents that the district court determined that Local 528 and Kroger had agreed to the treatment or designation of the newly hired as "casuals." Petition 8, 9. In fact, the district court determined that Kroger and Local 528 "acquiesced in the treatment of all new hires as 'part-timers' not entitled to pension contributions," but at no point did it indicate that they had agreed to treat the part-time employees

B. The Court Of Appeals Did Not Determine That Section 515 of ERISA Bars Consideration Of Union-Employer Understandings That Are Actually Disclosed To Multi-Employer Funds.

Kroger does not challenge the unanimous view of the courts of appeal "that Section 515 allows funds to enforce CBAs free of certain defenses that the employer might otherwise assert in an action brought by the union, including . . . oral modifications by the union and employer unknown to the fund." Petition at 2. However, Kroger contends that the Seventh Circuit impermissibly extended this rule by prohibiting consideration of union-employer understandings that are contemporaneously disclosed to a fund. According to Kroger, this holding creates another conflict with the Third Circuit's *Rolls Royce* decision where, in Kroger's view, the court held that § 515 does not bar an employer defense based upon a union-employer oral agreement that has actually been disclosed to a Fund. But nothing in the Seventh Circuit's decision remotely forecloses an employer defense predicated upon an oral understanding that has been actually disclosed to a fund. That issue was not addressed because there was no finding that the Kroger-Local 528 understanding had been disclosed to Central States because in fact, it was not disclosed. Therefore, the decision below does not conflict with the Third Circuit's decision.

The court of appeals held that § 515 of ERISA "entitles pension funds to enforce the terms of agreements when those terms are unambiguous," so Central States' reliance upon the writing could "not be thwarted by oral understandings

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under the contract definition of casuals. In fact, the district court found Kroger's evidence that the terms were used synonymously by the parties to be "unpersuasive" and determined that Local 528 and Kroger "acted according to their own lights, with little or no regard to whether their mutual understanding of whom would be paid fringe benefits comported with the terms of the master agreement." Pet. App. at 23.

between the employer and union." Pet. App. 11a, 16a. Nothing in the opinion indicates that the court of appeals believed that Central States actually knew about the understanding or that the rule that § 515 of ERISA bars evidence of oral understandings when there was disclosure to the Fund. The court of appeals reviewed several of its prior rulings under § 515 and noted that in one case, it had held that even a written union-employer side agreement would not be a valid defense to a multiemployer fund's claim, but only if it had "not been disclosed to the fund." Pet. App. 11 (citing, *Central States Pension Fund v. Transport, Inc.*, 183 F.3d 623, 628 (7th Cir. 1999)). Thus, the court of appeals actually suggested that disclosure to a fund of a written side agreement would make a difference. Further, the Seventh Circuit has indicated in its prior decisions that § 515 "precludes the use of extrinsic evidence that was *unknown to a pension or welfare fund*" thereby suggesting that disclosure to the fund of an oral agreement might make a difference. *Central States Pension Fund v. Transport, Inc.*, 183 F.3d at 628, *quoting*, *Central States Pension Fund v. Central Cartage Co.*, 69 F.3d 1312, 1315 (7th Cir. 1996)(emphasis added).[3] Thus, Kroger's assertion that the decision below forecloses employer defenses based upon a side agreement that was disclosed to a fund is not accurate.

The issue of whether the rule barring evidence of oral union-employer agreements disclosed to a fund was not addressed by the court of appeals for the simple reason that

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[3] In *National Boilermakers Welfare Joint Trust v. Florida Lining & Welding, Inc.*, 2000 WL 420749 (N.D. Ill. April 12, 2000), then District Judge Williams held that the Seventh Circuit's decisions under § 515 did not bar evidence of an oral understanding that was contemporaneously disclosed to a fund. Six months later, Judge Williams was a member of the Seventh Circuit that unanimously denied Kroger's petition for rehearing *en banc*, so she apparently did not believe the panel decision made the holding that Kroger now claims was made.

Kroger did not argue that Central States knew about the oral agreement, and the reason Kroger did not make the argument was because there was no evidence of actual disclosure of the agreement to Central States. Instead, the argument in Kroger's appellate brief was limited to the assertion that § 515 did not bar consideration of its parol evidence because its agreement was ambiguous, so the evidence of the union-employer understanding was being offered to decipher the contract language, not to contradict the terms of an unambiguous agreement. Resp. App. 6a-8a. With respect to Central States' knowledge, Kroger only argued that Central States knew about the 1991 grievance decision before Central States initially asserted its claim for additional contributions and Kroger maintained that Central States had a duty to investigate to determine what the parties actually intended because the contract was unclear. *Id.* However, in its argument relating to the scope of § 515, Kroger never asserted that Central States had actual knowledge about the Kroger-Local 528 understanding before the 1991 audit. *Id.*

The reason Kroger did not argue that Central States was aware of the Kroger-Local 528 understanding was because it was clear that Central States did not know. The district court specifically found that Local 528 and Kroger acquiesced in the exclusion of the new hires and the new hires were told they would be excluded. Pet. App. 6a, 7a. Central States' name is conspicuously missing from this listing of who was aware of the understanding.[4] No witness testified that Central

[4] It is true that the district court indicated in connection with Kroger's estoppel defense that Central States had been silent "over the long period of time involved." Pet. App. 24a. However, the court made no finding with respect to the reason for Central States' silence and ultimately rejected the estoppel defense because Central States had not made a knowing misrepresentation to Kroger but was "[a]t most . . . negligent." Pet. App. 25a. The reason for Central States' silence was its utter lack of knowledge of the Kroger-Local 528 understanding.

States was told and no document showed that Central States received express notice of Kroger's agreement. *Id.*

In connection with its estoppel defense (and only in connection with the estoppel defense) Kroger claimed that Central States should have known about its practices because beginning in 1975, Kroger allegedly provided Central States with a monthly computer printout listing hundreds of employees that, if carefully examined, would have shown for a minuscule portion of the listed employees that there was "a significant gap between the date of hire . . . and the date on which the petitioner began making contributions on them." Petition at 25. However, both Kroger and Central States agreed that Central States disregarded these printouts because they were not in a useful format for Central States. Resp. App. 9a-10a; Trial Tr. 591-97, 810-12. Thus, even Kroger conceded that these reports did not provide Central States with actual notice of the understanding. *Id.* Even if the printouts had been examined, they did not tell Central States the reason for the gap or that, contrary to the explicit language of the agreement, that contributions would not be paid on permanent employees after 30 days of employment. Further, Kroger's assertion that Central States received these printouts beginning in 1975 is untrue. In fact, Central States did not begin receiving the printouts until October 1987. Trial Tr. 696-97

Kroger also argues that Central States knew about the understanding because R. Jerry Cook was the President of Local 528 and, beginning in 1985 or 1986, he was also a Trustee of Central States. While the district court found that the local union negotiators acquiesced in Kroger's practice of labeling all new hires as part-timers, there was no finding that Cook was ever personally aware of the practice. In fact, Cook testified at trial without contradiction that he did not know about the practice prior to the 1990 grievance proceeding. Trial Transcript 21, 28, 36-37. Kroger also

advised the court of appeals that Cook "was totally uninvolved in the day to day administration and negotiation of the Atlanta Local Supplement" and it conceded that at the time of the 1991 grievance hearing, Cook thought the "contributions [sought by Central States] were required." Resp. App. at 2a-3a. In its closing argument at trial Kroger also indicated that Cook's testimony established "how little he knew . . . . about what was going on in the Atlanta warehouse over the extended period of time from 1976 to 1991" and that during that time frame Cook "played . . . [a] minimal role in negotiation and administration of the local supplement language . . . and was not involved in the detailed administration or negotiation of the local supplement language covering the Atlanta warehouse". Trial Tr. at 907-8. Given Kroger's concessions concerning Cook's lack of knowledge, Kroger's claim that Central States knew about the understanding because Cook was a trustee is obviously without merit.

Moreover, even if Kroger had proved Cook was aware of the understanding, the alleged knowledge gained by Cook in his union capacity before he became a Central States trustee, was not obtained within the scope of his duties as a trustee and is not attributable to Central States. *Illinois Conference of Teamsters Welfare Fund v. Mrowicki*, 44 F.3d 451, 464 (7th Cir. 1994). To be binding upon Central States, Kroger would have to show that Cook actually disclosed the agreement to Central States which Kroger could not do because Cook was unaware of the agreement and he never discussed the contract negotiations with anyone at Central States. Trial Tr. 16.

Since the decision below does not preclude employer defenses based upon oral agreements that are actually disclosed to a fund, Kroger's petition should be denied.

C. The Third Circuit Would Not Permit Kroger to Contradict The Unambiguous Contract Definition Of The Term Casual Employee Even If Kroger's Unusual Meaning Had Been Disclosed to Central States.

Even if the Seventh Circuit had determined that an oral understanding which had been disclosed to Central States was not binding as Kroger now contends, that determination would not be contrary to the Third Circuit's *Rolls-Royce* decision. *Rolls-Royce* is distinguishable because in that case, the determinative factor was the ambiguity of the contract, not the knowledge of the fund.

The Third Circuit has dealt with a case involving the effect of a fund's knowledge of the bargaining history where the contract language was unambiguous, as it was determined to be in this case. In that case, the court held that when the contract language was unambiguous that "it is evident from Section 515 and Congress's intent in passing it that the fund still should be able to rely upon the language of the collective bargaining agreement as written . . . even if a multiemployer welfare fund has some knowledge of the negotiating history leading up to the agreement." *Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1103 (3rd Cir. 1996). The court observed that through § 515, Congress sought to "minimize the administrative costs of detecting and collecting delinquencies that 'detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans.'" *Id.* (quoting) 126 Cong. Rec. 23,039 (1980) (Rep. Thompson)). Litigation over what the agreement between the union and employer really meant, as well as whether a fund was aware of the understanding and when it obtained the knowledge is time consuming, expensive and error-prone and invites uncertainty, all to the detriment of the participants and beneficiaries that § 515 was intended to protect.

In this case, Central States has incurred over $500,000 in attorneys' fees and costs as well as substantial administrative costs and the only reason Kroger preponderated on the issue of Local 528's acquiescence was because the business agent who dealt with Kroger was unavailable to testify at trial because he died in 1991.

Further, the *McCormick Dray Line, Inc.* court indicated that if funds were required to interpret contracts "based upon information they may have regarding the negotiations of the underlying collective bargaining agreements, the chore of preparing their actuarial calculations would be highly burdensome and expensive." *Id.* There would also be significant risk that the fund might misjudge what the parties intended and if this occurred, the actuarial calculations may be erroneous and any resulting losses would be borne by the beneficiaries of the fund in the form of lower benefits or other participating employers in the form of higher contributions. The court concluded that by enacting section 515, "Congress sought to eliminate such problems, leaving to employers and unions the simpler task of insuring that the plain language of their collective bargaining agreements represent their intentions." *Id.*

In this case, Kroger signed CBAs which state that the only employees who would be excluded from pension contributions would be casual employees and it agreed to a definition that indicated the term meant employees hired on a "short term basis" who would work from "time to time." It now claims that it really meant that every new hire would be excluded from pension participation for a lengthy period of time even though the district court found that the new hires were neither short time nor working from time to time. Kroger has not explained why the CBAs unambiguously reflected the opposite of what it now claims was its "real" intent. Obviously, Kroger had the ability to make the CBAs reflect its alleged intent (which it finally did in 1992 after

Central States asserted its claim). The *McCormick Dray Line, Inc.*, decision establishes that the Third Circuit believes that § 515 obligated Kroger to insure that the contract reflected its actual intent and Central States should not be forced to litigate over the parties "real" intent and whether the "real" intent was conveyed to Central States.

Kroger's effort to evade the unambiguous contract language is also prohibited by § 302(c)(5) of the NLRA. 29 U.S.C. § 186(c)(5). Section 302(c)(5) permits employer payments to multiemployer plans only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5). Section 302 was enacted because Congress was "concerned with corruption of collective bargaining through bribery of employee representatives by employers with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425-6 (1959). "The Congressional intent was to allow each employer to know and . . . have a basis for enforcing his rights, and to eliminate discretion in union leaders to divert the funds." *Gariup v. Birchler Ceiling Co.*, 777 F.2d 370, 375 (7th Cir. 1985), *quoting*, *Denver Metro Plumbing Contractors v. Journeymen Plumbers Local 208*, 586 F.2d 1367 1372 (10th Cir. 1978). "Congress required that a written agreement exist between the employer and the employees' representative governing the rights of employees on whose behalf the contributions were made to ensure 'that employee benefit trust funds are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them'." *Id.*, *quoting*, *United Mine Workers Association Health Fund v. Robinson*, 455 U.S. 562, 570 (1982).

Based upon these considerations, the Third Circuit held in *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 443 (3rd Cir. 1967)

that § 302(c)(5) prohibited an employer from relying upon oral understanding to vary its written promise to a pension fund. Based upon 302(c)(5), other courts have refused to enforce oral understandings, even where the employer has, like Kroger, asserted that a trustee of the fund was aware of the agreement. *Teamsters Local 348 Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984); *Boyle v. North Atlantic Coal Co.*, 331 F.Supp. 1107 (W.D. Pa. 1971), *cf*, *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) (ERISA prohibits oral modification of trust provisions by trustees); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (same).

McCormick Dray Line, Inc. and *Seanor Coal Co.* establish that the Third Circuit would not permit Kroger to rely upon an intent that was not reflected in the unambiguous CBA definition of the term casual employee, even if the employer argued that the intent had been disclosed to Central States. Therefore, the petition should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE KROGER WOULD NOT PREVAIL IF THE THIRD CIRCUIT'S FORMULATION FOR DETERMINING CONTRACT AMBIGUITY WAS ADOPTED.

Kroger makes the astonishing assertion that the Third Circuit has completely abandoned the parol evidence rule and destroyed a party's right to rely upon an unambiguous contract. In Kroger's view, a party can always submit parol evidence to add to, modify or contradict contract language that is clear on its face. In reality, the Third Circuit's approach is far narrower than Kroger represents.

To determine whether a contract is ambiguous, the Third Circuit would "hear the proffer of the parties and determine if there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible

of different meanings." *Rolls Royce*, 989 F.2d at 135 (*quoting*, *Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1284 (3rd Cir. 1991). Reference must be made to the "contract language, the meanings suggested by counsel and the extrinsic evidence offered in support of each interpretation." *Id.* What Kroger fails to mention is that "the focus must remain on the [contract] language selected by the parties" and the parol evidence is considered only because the meaning of words can depend upon the context and what seems clear without context may be ambiguous when understood from the linguistic reference point of the parties. *American Cyanamid Co. v. Fermenta Animal Health Co.*, 54 F.3d 177, 181 (3rd Cir. 1995). Thus, the determination of whether ambiguity exists must be anchored on the contract language so "a text unambiguous when accorded the commonly understood meaning of its words cannot be disregarded unless extrinsic evidence is such as to cause a reasonable fact finder to understand the text differently." *Id.* So the parol evidence can only be used for the very limited purpose of illuminating the context of the agreement, but it cannot be used to contradict the contract language as Kroger seeks to do in its petition. *Id.*

Kroger completely ignores the need to connect the parol evidence with the contract language for the simple reason that its proffered interpretation is not only unsupported by the contract language, it actually contradicts it. Kroger claims that despite the language defining casual employees as employees "hired on a short term basis" to work "from time to time", the extrinsic evidence showed that the parties really intended the term to refer to employees that the district court determined were actually long-term, permanent employees. However, Kroger's evidence does not cast any doubt on the meaning of the language of the contract, at most, the evidence shows that the parties made a side agreement that patently conflicts with the contract language. However, evidence of an oral understanding cannot be used to contradict the clear

language of the agreement. *Id.* Thus, the Third Circuit would not determine that the CBAs were ambiguous.

Kroger also claims that its petition should be granted because the Seventh Circuit's opinion improperly forecloses an employer from claiming that its contract is extrinsically ambiguous—meaning the contract is clear on its face to the untutored reader but anyone familiar with the real world context would wonder what the parties really meant. *AM International, Inc. v. Graphic Management, Inc.*, 44 F.3d 572, 574 (7th Cir. 1995). However, Kroger did not assert that its contract was extrinsically ambiguous so the Seventh Circuit did not decide that the extrinsic ambiguity doctrine was unavailable in this case. As such, the issue of the availability of the doctrine could not be resolved in this case.

Indeed, this is not a case where the extrinsic ambiguity doctrine could apply. Only evidence provided by disinterested third parties can be used to establish extrinsic ambiguity and Kroger provided absolutely no such evidence. *Id.* at 575. Kroger's reliance upon *Raffles v. Wichelhaus*, 2 H.&C. 906, 159 Eng. Rep. 375 (Ex. 1864) is misplaced. In *Raffles*, the contract was extrinsically ambiguous because even though the reference in the contract to the ship Peerless was clear on its face, objective extrinsic evidence showed that there were two ships named the Peerless. The example concocted by Kroger in its petition based upon *Raffles v. Wichelhaus* ignores the fact that the contract in this case, unlike the contract in *Raffles v. Wichelhaus*, did explicitly define the contract term. A more analogous example would be a case involving a contract that required contributions on employees working on the Peerless which then defined the term as the Peerless on the Potomac. Certainly, no court would allow the employer to limit its obligation because the union and employer claim that they really meant the employees on the Peerless in Lake Michigan because the contract language clearly indicated otherwise. So too, Kroger cannot argue that

a contract that used the term casual employee and then defined the term as employees hired on a "short term basis" who work "from time to time" really means that casual employees were those employees who were found to be permanent, long-term employees by the district court.

It is not the law in any circuit (including the Third Circuit) that an employer can use parol evidence, not to explain a contract term, but to contradict the explicit contract definition of the term. Since Kroger could not prevail, its petition should be denied.

CONCLUSION

For the foregoing reasons, respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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